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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 528

UNITED STATES OF AMERICA, EX REL. TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

S. COLUMBUS WELCH [1]

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the United States of America, acting upon the relation and for the use of the Tennessee Valley Authority, prays that writs of certiorari issue to review the judgments of the United States Circuit Court of Appeals for the Fourth Circuit entered in these cases.

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[1] Together with No. 529, *United States of America, ex rel. Tennessee Valley Authority, Petitioner* v. *John Burns, et al.;* No. 530, *United States of America, ex rel. Tennessee Valley Authority, Petitioner* v. *Fred Lollis, et al.;* No. 531, United *States of America, ex rel. Tennessee Valley Authority, Petitioner* v. *Arnold E. Bradshaw, et al.;* No. 532, *United States of America, ex rel. Tennessee Valley Authority, Petitioner* v. *Philip G. Rust, et al.;* and No. 533, *United States of America, ex rel. Tennessee Valley Authority, Petitioner* v. *Abraham Cole Hyatt, et al.*

OPINIONS BELOW

The opinions of the district court (R. 12–21) are not reported. The opinion of the circuit court of appeals (R. 201–210) is reported in 150 F. 2d 613.

JURISDICTION

The judgments of the circuit court of appeals were entered on July 21, 1945 (R. 210, 212–214, 215, 216, 219). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, when respondents' easements of access have been taken and destroyed by the Tennessee Valley Authority's permanent flooding of the only highway serving their properties, a court can set aside the determination of the Board of Directors of the Tennessee Valley Authority, made in good faith and after a careful evaluation of all available alternatives, that the taking of the fee in respondents' properties is necessary to accomplish an adjustment of the problems resulting from the flooding of the highway.

STATUTE INVOLVED

The provisions of the Tennessee Valley Authority Act of 1933 appear at R. 107–159.

STATEMENT

The United States of America, on behalf of the Tennessee Valley Authority, filed, in the United

States District Court for the Western District of North Carolina, six separate petitions to condemn the lands of the respondents, and, simultaneously therewith, declarations of taking (R. 1–11). Upon stipulation of the parties (R. 41–45), all six cases were consolidated for purposes of the petitioner's appeal (R. 45–46). The facts out of which this litigation arose are as follows:

Under the powers conferred upon it in the Tennessee Valley Authority Act of 1933, as amended (R. 107–159), the Tennessee Valley Authority constructed a dam and reservoir on the Little Tennessee River in western North Carolina, known as the Fontana Dam and Reservoir (R. 23). The filling of this reservoir flooded North Carolina State Highway No. 288 throughout most of its length from the Fontana damsite to Bryson City, N. C. This highway had been the only road providing access to approximately 44,000 acres of land lying on the northern side of the Little Tennessee River between the Fontana damsite and Bryson City, and its flooding left the entire area inaccessible, except to a limited extent by water or by foot trails. (R. 23, 221, 222.) The area, inhabited by about 216 families before the construction of the dam (R. 62), is bounded on the north by the Great Smoky Mountains National Park, and is, in fact, within the

boundaries of that park as originally authorized and defined by Congress (R. 77, 102).[2]

State Highway No. 288 was owned and maintained by North Carolina but had originally been financed by bond issues upon which Swain County, N. C. was obligated (R. 24). It was a narrow, dangerous road, far below modern standards of highway construction (R. 33), following a tortuous course from Deals Gap, N. C. to Bryson City (R. 63). Its flooding created a variety of problems, and the State of North Carolina and Swain County demanded that some action be taken to protect them (R. 24).

The negotiations which ensued (R. 24–25) revolved about two major considerations: (1) the flooding of Highway 288 isolated the area previously served by it and thus effected a taking of the private access rights of the landowners in that area (R. 64, 94), and (2) the flooding of the highway destroyed a link in the North Carolina state highway system and thus effected the taking of an interest vested in the State (R. 84, 101–102). It soon appeared that reconstruction of Highway 288 was not practicable. The War Production Board informally advised the Authority, during the course of the negotiations, that the reconstruction of the high-

[2] The cost of acquisition of the park land was greater than originally contemplated, however, and for this reason this area was not included within the park (R. 77, 102).

way was not sufficiently important to justify the expenditure of materials and manpower required (R. 77, 86, 102, 169).[3] To replace this road with a road of similar quality would have required an expenditure of approximately $1,400,000 (R. 34). The State, the County, and the Authority all recognized that such a replacement would, at any time, have represented an unwise and inefficient expenditure of public funds (R. 85–86, 92, 102, 169). During wartime it would, in addition, have required the diversion of great quantities of supplies and equipment sorely needed in the conduct of the war, and the use of valuable manpower at the height of the worst manpower shortage in the Nation's history (R. 34, 90–93).

Condemnation of the highway was also considered. But in condemnation proceedings, petitioner would presumably have been liable for the reasonable cost of rebuilding the road, a sum in the neighborhood of $1,400,000 (R. 34, 65); and the payment of the judgment in such proceedings, while it would have extinguished petitioner's legal liability to the State, would not have extinguished its liability to the owners of

[3] The district court found (R. 24, 35) that "the Authority was advised by the War Production Board that it was extremely doubtful whether sufficient priorities would be granted to permit obtaining the necessary equipment and materials in time to build the road before the lake level was raised."

the lands served by the road. The petitioner would have remained liable to such owners for the damage resulting from the destruction of their only means of road access, and the settlement of this liability would have cost substantially the value of the property—about $775,000 (R. 94, 99, 105). The satisfaction of its legal liabilities in this manner would, therefore, have cost the petitioner in excess of $2,000,000, and this expenditure would not have solved the problems created by the construction of the reservoir since the families living in this area would have been left isolated without either roads, schools, or public health or law enforcement facilities (R. 94).

The State insisted that any solution give it absolute assurance that it would be relieved of the necessity of constructing any new facilities to replace Highway No. 288, and also be satisfactory to Swain County, which, while without legal interest in the road, was obligated on an outstanding bond issue. The State refused to accept the plan suggested by some of the landowners that the Authority purchase from all of the individual landowners their rights of access. It insisted that all of the area served by the highway be taken out of private ownership if Highway No. 288 was not to be reconstructed. (R. 69, 79–81.)

The only solution acceptable to the State and the County was the one finally adopted. This solu-

tion is embodied in the settlement contract between the State, the County, the National Park Service, and the Authority (R. 167–187). The essential provision in that agreement is that the Authority must acquire all the land previously served by Highway No. 288, either by voluntary acquisition or condemnation, so as to exonerate the State from any liability to provide access to these properties (R. 170, 171–174).[4] The contract also provides for the transfer of the lands so acquired to the National Park Service for inclusion within the boundaries of the Great Smoky Mountains National Park (R. 103, 174–176), and for the construction by the Park Service of a parkway through the area whenever funds therefor might be made available by Congress (R. 104, 177–179). This parkway is contemplated in the Master Plan evolved by the National Park Service for the development of the Great Smoky Mountains National Park (R. 177). The State agreed to contribute $100,000 to aid in the acquisition of this park land (R. 182, 104), and the Authority agreed to pay Swain County $400,000, to be used in retiring a portion of the road bonds (R. 103, 182).

[4] The contract excepted the lands belonging to the North Carolina Exploration Company (R. 172), and acquisition of the tract owned by the North Carolina Mining Corporation was permitted to be postponed until a date six months after the cessation of hostilities. This was done because the parties recognized that the mining of this tract of land might be of importance to the prosecution of the war. (R. 172–173.)

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When this contract was presented to the Board of Directors of the Authority for its consideration, the Board had before it the report and recommendations of its staff which described the situation above outlined and the reasons for the proposed contract (R. 23, 25, 33, 100–106). Upon the basis of such report and recommendation, the Board, on September 20, 1943, adopted a resolution approving the contract and authorizing its execution on behalf of the Authority. With respect to the fee interest in the lands served by Highway 288 and owned by respondents, the Board passed resolutions stating that (R. 100)

> the acquisition of the aforesaid interests in the aforesaid tracts of land by the Tennessee Valley Authority is deemed by the Board to be necessary for the carrying out of the provisions and purposes of the Tennessee Valley Authority Act of 1933.[4]

These determinations were made in good faith (R. 23, 33).

The Authority purchased all the lands whose acquisition was contemplated by the contract, with

[4] Such a resolution with respect to the lands belonging to John Burns, et al., was passed on June 8, 1944 (R. 22). One respecting the lands of S. Columbus Welch was passed on April 25, 1944 (R. 22–23), and resolutions with respect to the lands of Philip G. Rust, Fred Lollis, Arnold E. Bradshaw, and Abraham Cole Hyatt, were passed on July 26, 1944, October 7, 1944, and December 12, 1944 (R. 32–33).

the exception of the tracts owned by the respondents (R. 34, 205, 221, 222). Apart from about one and one-half acres of land owned by respondent Welch and as to which there is no controversy (R. 26), none of the respondents' lands were flooded by the impounding of the waters of Fontana dam but the rights of access of all were taken by the flooding of Highway 288 (R. 23, 34).

The district court, after announcing opinions in these cases (R. 12–21) and making findings of fact (R. 22–40), entered judgments dismissing the condemnation petitions and striking its former orders placing the Authority in possession of the lands (R. 1–11).[6] The circuit court of appeals affirmed these judgments (R. 210).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the petitioner was without legal power to condemn respondents' lands;

2. In holding that the Tennessee Valley Authority Act does not confer upon petitioner the legal power to acquire respondents' lands;

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[6] As to respondent Welch, the order of taking was modified to authorize continued possession only of the small tract actually flooded (R. 2). The judgments in the cases of respondents Welch and Burns ordered the landowners to release their rights to any recompense for the flooding of the highway and the consequent taking of their rights of access (R. 2–3, 5). This was done on the consent of these respondents (R. 13, 14).

3. In holding, in effect, that the question of the necessity for the taking of lands is a judicial question;

4. In holding that petitioner cannot legally condemn a fee interest in lands when, in the opinion of the court, an easement would be sufficient to meet its requirements;

5. In holding that the court can review a determination made in good faith by the Board of Directors of the Tennessee Valley Authority as to the necessity for the acquisition of an interest in land and substitute its determination for that of the Board of Directors;

6. In holding that the lands were taken by the petitioner for the purpose of transferring them to the National Park Service, Department of the Interior;

7. In holding that the lands were not taken for a public use; and

8. In holding that the Federal Government may not condemn a fee interest in lands even though an authorized taking by the Government has substantially destroyed the value of the lands and the owners are entitled to compensation for that taking.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below is in conflict with that of the Circuit Court of Appeals for the Seventh Circuit in *United States* v. *Meyer,* 113 F. 2d 387, certiorari denied, 311 U. S. 706. Con-

demnation of a fee simple interest in property for use in connection with a dam on the Mississippi River was there resisted on the grounds that the statutes pursuant to which the petition was filed contemplated the taking of no greater interest than a flowage easement, and that the determination of the Secretary of War that the fee interest was necessary for the accomplishment of the purposes of the project was made in bad faith because the property was to be used for the development of parks and recreational facilities adjacent to the pools created by the dam. The Circuit Court of Appeals for the Seventh Circuit sustained the condemnation petition, holding that the Secretary of War's determination of necessity was not an abuse of discretion, and that the alleged purpose of the taking was not inconsistent with the purpose contemplated by the statutes—betterment of navigation and flood control.

While the *Meyer* case did not arise under the Tennessee Valley Authority Act, the condemnation there sanctioned rested on statutory provisions which, if different at all from those of the Tennessee Valley Authority Act, restricted the eminent domain powers more narrowly. See 113 F. 2d at 392. The Tennessee Valley Authority Act empowers the Authority to condemn "all property that it deems necessary for carrying out the purposes of this Act" (Sec. 4 (i), R. 113), and "any lands, easements, or rights of way which, in the opinion of the Corporation, are nec-

essary to carry out the provisions of this Act" (Sec. 25, R. 153). Other provisions of the Act indicate that this eminent domain power may be used not only with respect to lands which are to be the sites of dams or reservoir, but also with respect to lands found necessary in the settlement of readjustment and relocation problems resulting from the construction of the dam or reservoirs. See, *e. g.*, Sections 4 (k) (*d*), 4 (l), 18, and 31, at R. 115–116, 147–148, and 159.[1]

The legislative history of the Act makes it clear that just such a taking as is here involved was contemplated by Congress. Added by amendments adopted in 1935 (49 Stat. 1080), Section 31 of the Act, as reported by the House Committee on Military Affairs, prohibited the acquisition of any land not "actually necessary to carry out plans and projects actually decided upon requiring the use of such land." H. Rep. No. 1372,

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[1] Nothing in the record supports the suggestion of the court below (R. 203, 210) that the controlling purpose of the Authority in authorizing the takings here involved is to convey them to the Department of Interior for incorporation into the Great Smoky Mountains National Park. The property is sought to be condemned as a necessary means of settling the Authority's liabilities to respondents and the State. That the property will be transferred to the Park Service is one consideration and an incidental result contemplated by the Tennessee Valley Authoity Act (Section 4 (k), R. 114) and as to which respondents have no standing to complain. *United States* v. *243.22 Acres of Land*, 129 F. 2d 678 (C. C. A. 2), certiorari denied *sub nom. Lambert* v. *United States*, 317 U. S. 698; *United States* v. *Forbes*, 259 Fed. 585, 591–592 (M. D. Ala.), affirmed, 268 Fed. 273 (C. C. A. 5).

74th Cong., 1st sess., p. 22. But in a supplemental report, Representatives Kvale and Maverick pointed out (*id.* at 33) that "In the development of the Norris, Wheeler, and Pickwick Reservoirs, it has been necessary and economical to buy areas outside the water line" and further stated that:

> in some sections in the reservoir areas, little peninsulas of land are necessarily isolated. The reservoir waters, will flood out the old valley roads which formerly gave access to these sections. It has been found much cheaper to buy up the lands in peninsulas than to construct new roads along the steep mountain sides. * * *
>
> * * * to prohibit the acquisition of such lands, obviously, would greatly increase the cost of the project.

The prohibition contained in Section 31, as reported out by the House Committee, was eliminated in the Section as finally adopted. See H. Rep. No. 1846, 74th Cong., 1st Sess., pp. 6, 9.

2. To avoid a settlement of its legal obligation which would cost more than $2,000,000 and leave 216 families completely isolated, without roads, schools, churches, or any health or community services, the Authority decided against the condemnation of Highway 288 and the purchase of the easements of access appurtenant to the lands formerly served by that highway. Relocation of Highway 288 was also rejected as a means of settlement because reconstruction of this narrow,

dangerous road would have been a patent waste of public funds at any time and was probably impossible in time of war.

Instead, the Authority adopted the only plan acceptable to the State of North Carolina and Swain County.[8] This plan, the final step in which is the condemnation of respondents' lands, made possible the settlement of the petitioner's legal obligations for about $1,075,000; the payment in full of all persons owning property in the affected area; the release of the County and State from the obligations of law enforcement, public health preservation and education; the liquidation of most of the bonds on which Swain County was obligated with respect to the financing of Highway 288; the extension of the Great Smoky Mountains National Park substantially to its original boundaries; and the construction at a future date of a parkway which was contemplated in the Master Plan of the National Park Service for the Great Smoky Mountains National Park and which would

[8] Respondents alone claim dissatisfaction with this plan but it is apparent that their present position is founded on the hope that the 35,000 acres already acquired by the Authority (R. 34) will be incorporated into the Great Smoky Mountains National Park and that the Park Service will build a road through the area. Respondent Welch, the only respondent who testified, admitted as much (R. 99). Surrounded by a national park and served by a parkway, their lands would be a recreational paradise. At the same time, all of the respondents, except Welch and Burns who have waived that right, would recover substantial damages for the taking of their easements of access.

also accommodate the through traffic previously served by Highway 288.

Beyond this, the Authority's Board of Directors also considered the fact, undisputed on this record (R. 94, 99), that the flooding of Highway 288 substantially destroyed the value of respondents' lands and the liability thereby incurred by petitioner would have approximated the value of the fee. Cf. *Schiefelbein* v. *United States*, 124 F. 2d 945 (C. C. A. 8); *Union Electric Light & Power Co.* v. *Snyder Estate Co.*, 65 F. 2d 297 (C. C. A. 8); *Hiatt* v. *City of Greensboro*, 201 N. C. 515; *Davis* v. *Alexander*, 202 N. C. 130; see annotations, 49 A. L. R. 330 and 93 A. L. R. 639.

There is no finding that the determination of the Authority's Board of Directors, that the condemnation of respondents' lands was necessary in order to carry out the purposes of the Tennessee Valley Authority Act, was made in bad faith or constituted an abuse of discretion. On the contrary the district court expressly found that the determination was made in good faith and it repeatedly commented that it thought the plan was a good one.[9] Nevertheless the court below held

[9] "The COURT. I think it's a fine plan, everything you did, and I thoroughly approve of it" (R. 81). "The COURT. I think your plan was good, and it is going to work out well if you can just get the land that belongs to these fellows here" (R. 89).

that while petitioner could condemn the respondents' easements of access, the lands themselves "were not needed for any purpose authorized by the statute" (R. 207).

In thus rejecting the Board's good faith determination of necessity, the decision below is in conflict with the decisions of this Court in *Rindge Co.* v. *Los Angeles County,* 262 U. S. 700, 708–710; *Joslin Co.* v. *Providence,* 262 U. S. 668; *Bragg* v. *Weaver,* 251 U. S. 57; *Sears* v. *Akron,* 246 U. S. 242; *Shoemaker* v. *United States,* 147 U. S. 282; and *United States* v. *Gettysburg Electric Ry.,* 160 U. S. 668. The intrusion of the court below into the legislative task, delegated to the Authority's Board of Directors, of determining the necessity for a taking is also in conflict with the decisions in *United States* v. *Meyer,* 113 F. 2d 387 (C. C. A. 7), certiorari denied, 311 U. S. 706; *Barnidge* v. *United States,* 101 F. 2d 295 (C. C. A. 8); *United States* v. *Threlkeld,* 72 F. 2d 464 (C. C. A. 10), certiorari denied, 293 U. S. 620; and *Atlantic Coast Line R. Co.* v. *Town of Sebring,* 12 F. 2d 679 (C. C. A. 5). The conflict with *United States* v. *Meyer, supra,* is particularly striking. See *supra,* pp. 10–11. In that case, the landowners claimed that the operation of the dam completely destroyed their lands, and the court, in language apt with reference to the proof in this case that the flooding of Highway 288

made respondents' lands practically valueless (see *supra*, pp. 3, 6, 15), said (113 F. 2d at 392):

> If there was a complete taking or destruction of defendants' property, it would seem obvious that a fee simple title was requisite.

It is true that the circuit court of appeals in this case accorded verbal recognition to the rule announced in the above cases when it noted that "ordinarily, the necessity of a taking for public use is a legislative and not a judicial question and, when determined by the legislature, or by an agency created for that purpose, is not subject to review by the courts." (R. 206–207.) But in the face of the court's articulated rejection of the Authority's decision as to necessity, such a statement does not serve to forestall the confusion which will follow upon the conflict of judgments so created.

3. The holding of the court below that the taking of respondents' lands was "for a private use, or at most for a public use not authorized by statute" (R. 206) conflicts in principle with the decisions of this Court in *Brown* v. *United States*, 263 U. S. 78, and *Dohany* v. *Rogers*, 281 U. S. 362. We have already adverted to the statutory authorization for the condemnation here involved (see *supra*, pp. 11–13) and are thus here concerned only with whether the taking is for a public or private use. In the *Brown* case, this Court held that the acquisition of a town site to

replace a town partially flooded by an authorized reservoir was a taking for a public use, even though, as an incident of the readjustment, some of the tracts taken may be found to be surplus lots and may have to be sold. In language bearing closely on the case at bar, this Court said (263 U. S. at 81):

> the acquisition of the town site was so closely connected with the acquisition of the district to be flooded and so necessary to the carrying out of the project that the public use of the reservoir covered the taking of the town site. * * *
>
> * * * It was a natural and proper part of the construction of the dam and reservoir to make provision for a substitute town as near as possible to the old one.

The general purport of the *Brown* decision, significant here, is that where the taking of land is "a necessary step in the public improvement itself and is not sought to be justified only as a way for the United States to reduce the cost of the improvement by an outside land speculation" (263 U. S., at 84), it is sustainable as a taking for a public use. In *Dohany* v. *Rogers, supra,* condemnation of an interest in land to be used for the relocation of a railroad right of way eliminated by a state highway project was upheld, this Court noting (281 U. S. at 366) that "It is enough that although the land is to be used as a right of way for a railroad, its acquisition is so essentially a part of the project for improving a public high-

way as to be for a public use." Here, the taking of a fee interest in respondents' lands was a practical and preferable alternative to either the condemnation of the highway and the taking of the easements of access or the rebuilding of the highway. Either of these alternatives, the court below conceded (R. 207, 209), would have been legitimate. We submit that the plan chosen is no less necessary a "step in the public improvement itself," and cannot, with any accuracy, be described as "excess condemnation" (cf. R. 207).

Contrary to the statement of the court below (R. 208–209), *Brown* v. *United States, supra,* and *Dohany* v. *Rogers, supra,* are not distinguishable on the ground that in those cases that which was taken to afford substitute compensation was the same "sort of thing" as the subject of the original taking. In those cases strangers to the original project were subjected to the condemnation power as a means of compensation; here respondents' lands had already been rendered practically valueless by the concededly authorized taking of their easements of access, and the condemnation of their fee interests as a means of compensation not only to the State but to respondents themselves had a closer relationship, therefore, to the original project than did the takings involved in the *Brown* and *Dohany* cases.

4. The issue in this case is one of great importance to Government agencies engaged in the construction of dams and reservoirs. That the prob-

lems that have arisen are not peculiar to this particular project, but are, on the other hand, typical, is apparent from the experience referred to in the House Military Affairs Committee report on Section 31 of the Tennessee Valley Authority Act. See *supra*, p. 13.

An intelligent handling of the problems of readjustment arising out of the flooding of lands by an authorized dam can be had only if the Governmental agency which must deal with such problems is not too closely confined with respect to the particular means which may be adopted in their solution. Whether condemnation of the fee or only of an easement is necessary, is a question which often turns on how the property can be put to its maximum use and the interest of local governmental bodies in the disposition of the property. Unless the judgment of the court below is reviewed and reversed, such practical considerations will often have to be ignored.

CONCLUSION

For the foregoing reasons, this petition for writs of certiorari should be granted.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.

THOMAS J. GRIFFIN,
Solicitor,
Tennessee Valley Authority.

OCTOBER 1945.

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